Email Negotiations Form a Binding Land Contract without a 'Signature'

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Email is rapidly replacing other forms of communication as the preferred means of communication between contracting parties. The recent decision of Stellard Pty Ltd v North Queensland Fuel Pty Ltd [2015] QSC 119 reinforces the judicial acceptance of email as an effective means of creating a binding agreement and the willingness to adopt a liberal concept of 'signing' in an electronic environment.

Email and other forms of digital communication are rapidly replacing ordinary post as the predominant form of communication between commercial parties. Lawyers have also embraced the use of email, commonly modifying notice provisions in contracts to include email as an acceptable method of communication. Obvious practical and time saving benefits arise from the use of electronic communication in business and legal transactions. Email provides an expeditious method of communication that is readily accessible and enables transactions to be formed and performed more expediently than through fax or traditional communication. These same benefits have the potential to give rise to a number of legal risks such as uncertainty or ambiguity due to informality of language, contractual invalidity due to a failure to properly check the contents of an email or the creation of a binding agreement due to a failure to comprehend that emails can form the basis of a legally binding agreement.

Despite the seemingly rapid replacement of letters and faxes by business with e-mail, the jurisprudence about the legal effect of emails within a contractual paradigm is embryonic and often lacks clarity and certainty. Disputes involving email negotiations are becoming more common. Recent disputes involving the sale of land and leases[1] suggest that courts will not readily stray from existing contractual principles, with emails attributed a similar legal effect to letters. This article examines a recent decision in Queensland where a binding contract was formed by exchange of emails despite a 'subject to contract' condition and no formal signed contract.

Stellard Pty Ltd v North Queensland Fuel Pty Ltd [2015] QSC 119

Facts

Representatives of the buyer and seller agreed by email and subsequent phone conversations as to the terms of the agreement. The seller then asked for the terms of the offer to be put in writing. The buyer's representative sent an email (offer email) to the seller's representative confirming the offer of $1.6m stating:

> "This offer is of course **subject to contract** and due diligence as previously discussed. We are hopeful of effecting an exchange of contracts next Monday but need acceptance of our offer immediately so we are in a position to instruct the appropriate consultants to carry out the necessary investigations.
>
> I look forward to receiving your client's confirmation that our offer is accepted as clearly both parties are now going to start incurring significant expenses." (emphasis added)

1 See *Vantage Systems Pty Ltd v Priolo Corporation Pty Ltd* [2015] WASCA 21.

The following day the seller's representative sent an email accepting the offer (acceptance email):

> We accept the below offer which we understand will be **subject to execution of the Contract** provided (with agreed amendments) on Monday, minimal due diligence period and the provision of all information/reports etc that are obtained by the purchaser during the due diligence period.
>
> We look forward to progressing the matter further on Monday." (emphasis added)

The following week a draft contract of sale was sent by the buyer's lawyer for completion and execution by the seller. Three days later the representative of the seller emailed withdrawing from the 'negotiations'. Unbeknown to the buyer the seller had been negotiating with another party at the same time and entered a contract with them. The buyer alleged there was a valid and binding contract. The seller alleged their agreement was subject to execution of a formal contract.

Issues

Martin J considered two issues. First whether there was a binding contract formed despite the reference to the agreement being subject to execution of a formal contract. Secondly, whether the agreement evidenced by the email correspondence was enforceable under 59 *Property Law Act 1974* (Qld), s 59.

Categories from Masters v Cameron

The legal effect of a negotiated agreement which the parties agree is 'subject to formal contract' depends upon the intention of the parties. Consistent with general principles of contract interpretation, the intention of the parties is determined by construing the terms of the contract by reference to what a reasonable businessperson would have understood the terms to mean. This usually requires consideration of the language used by the parties, the surrounding circumstances known to them and the commercial purpose or objects of the contract.[2] Evidence of subjective intent on the part of one or both parties about whether a contract existed is not admissible. According to the High Court in *Masters v Cameron* (1954) 91 CLR 353 the legal effect of the negotiated bargain may fall within one of three classes:

1. The parties have reached finality in arranging all the terms of their bargain and intend to be immediately bound to the performance of those terms, but propose to have the terms restated in a form which will be fuller or more precise but not different in effect.[3]

2. The parties have completely agreed upon all the terms of the bargain and intend no departure from or addition to those terms, but nevertheless have made performance of one or more of the terms conditional upon the execution of a formal document.[4]

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2 *Electricity Generation Corporation v Woodside Energy Ltd* (2014) 251 CLR 640.

3 See for example *Wharf St Pty Ltd v Amstar Learning Pty Ltd* [2004] QCA 256 where the term stated an agreement "embodying the above terms" will be entered was found to be within the first category.

4 See for example *Niesmann v Collingridge* (1921) 29 CLR 177; *Moffat Property Development Group Pty Ltd v Hebron Park Pty Ltd* [2008] Q ConvR 54-703; [2008] QSC 177.

3. The intention of the parties is not to make a concluded bargain at all unless and until they execute a formal contract.

Case law, particularly in New South Wales, suggests the three categories are too narrow and that a fourth category should be recognised. The category was first explained by McLelland J in *Baulkham Hills Private Hospital Pty Ltd v GR Securities Pty Ltd* (1986) 40 NSWLR 622:

> where the parties intend to be bound immediately and exclusively by the terms which they had agreed upon whilst expecting to make a further contract in substitution for the first contract, containing by consent, additional terms.[5]

This category is utilised most commonly when considering the legal effect of heads of agreement, but is not restricted to that situation.[6]

There is no one factor that will determine whether the parties intended to be bound by the negotiated agreement. Use of words such as "subject to contract" or "subject to a formal contract" may provide prima facie evidence that no binding agreement was intended to be entered into until a formal contract was signed, but do not guarantee that outcome.[7] The ultimate outcome depends on a consideration of the document as a whole in the context of the surrounding circumstances.[8] A number of useful points can be drawn from the case law:

1. Where the communications and dealings between the parties indicate that some matters have been agreed upon, but there remain other significant terms yet to be resolved, then there will normally be no concluded bargain.[9]

2. The mere fact the agreement contemplates the signing of a formal agreement does not mean the agreement is not presently binding.[10] In contrast, the absence of a 'subject to contract' condition will make it difficult to dispute a binding agreement was intended.[11]

3. Depending on the size, importance and complexity of the subject matter, the less formal the initial agreement, the less likely it will be that it was intended to be legally binding and enforceable. An oral discussion which contemplates a subsequent formal written agreement is less likely to be intended to be immediately binding.[12]

4. Subsequent conduct of the parties can be taken into account. Later correspondence, oral communications, and action or inaction by the parties can be relevant in determining that it was not the intention of the parties to be presently bound before all the essential preliminaries had been agreed to, nor until a final contract had been drawn up, embodying

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5 See also *Helmos Enterprises Pty Ltd v Jaylor Pty Ltd* (2005) 12 BPR 23,021; and *Geemaz Management Pty Ltd v Geelong Motors Pty Ltd* [2013] VSC 571.

6 For a recent example refer to *James v Horne* [2015] NSWSC 465.

7 *Masters v Cameron* (1954) 91 CLR 353; *Rossiter v Miller* (1878) 3 App Cas 1124 at 1152.

8 *Allen v Carbone* (1975) 132 CLR 528 at 531–532.

9 *ABC v XIVth Commonwealth Games Ltd* (1988) 18 NSWLR 540 at 547-548; *Barrier Wharfs Ltd v W Scott Fell and Co Ltd* (1908) 5 CLR 647; Cf *Austotel Pty Ltd v Franklins Selfserve Pty Ltd* (1989) 16 NSWLR 582.

10 *Geebung Investments Pty Ltd v Varga Group Investments No 8 Pty Ltd* (1995) 7 BPR 14,551.

11 *Harold R Finger & Co Pty Ltd v Karellas Investments Pty Ltd* [2015] NSWSC 354.

12 *Geebung Investments Pty Ltd v Varga Group Investments No 8 Pty Ltd* (1995) 7 BPR 14,551.

all the matters incidental to a transaction of such a nature.[13]

5. In some circumstances, such as where there is a pressing and urgent need for one or more of the parties to engage immediately in some activity under the contract and where they cannot wait for the execution of a formal document, the court may find that the parties intend to be bound immediately in order to regulate legally the performance of such urgent activity.[14] This was a relevant factor in *Stellard Pty Ltd v North Queensland Fuel Pty Ltd* [2015] QSC 119.

6. Common commercial practice may be taken into account. For example, in NSW it is accepted that agreements for the sale of land are usually formed by exchange of contract and therefore parties do not intend a contract to be binding prior to that time.[15] In contrast, in Queensland it has been argued that a court should infer that negotiations between solicitors are always subject to contract. Whilst there is some support for this view[16] the more recent approach is that such an inference can be easily rebutted.[17] In the alternative the fact that parties contemplate that after their negotiations solicitors should draft the agreement may be a factor which points to the non-existence of a binding agreement until formal contract.

Application of Masters v Cameron

In *Stellard* the offer and acceptance emails were both stated to be 'subject to contract'. When considered in the broader context of the emails and surrounding circumstances, Martin J concluded by reference to the *fourth category* that the parties "were content to be bound immediately and exclusively by the terms which they had agreed upon whilst expecting to make a further contract in substitution for the first contract, containing, by consent, additional terms".[18] The factors relevant to this conclusion were:

a. In the offer email, the buyer emphasised the need for an immediate acceptance so that due diligence investigations could commence and asserted that upon confirmation of acceptance both parties were now going to incur significant expense;
b. The reference in the acceptance email to a formal contract, with agreed amendments, recognised the existence of a binding agreement between the parties even though further terms may be agreed;
c. There was evidence in earlier emails of the desire of the parties to proceed quickly and that each was going to take steps immediately. Sending an email accepting the formal offer within 1 hour was consistent with this intention; and
d. There was no evidence that the provision of personal guarantees was a condition precedent to the agreement or an essential requirement. Failure to include this as a term in the email was not fatal to the existence of a binding agreement.

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13 *Barrier Wharfs Ltd v W Scott Fell and Co Ltd* (1908) 5 CLR 647 at 669; *Howard Smith and Co Ltd v Varawa* (1907) 5 CLR 68; *ABC v XIVth Commonwealth Games Ltd* (1988) 18 NSWLR 540 at 547-548; *Geebung Investments Pty Ltd v Varga Group Investments No 8 Pty Ltd* (1995) 7 BPR 14,551.

14 *Hooper v Commonwealth of Australia* (unreported, Sup Ct NSW, Comm Div, Gleeson CJ, 16 Nov 1990), held that the Heads of Agreement there under consideration were intended to have an immediately binding effect.

15 See for example *Horne v James* [2015] NSWSC 465.

16 *Marek v Australasian Conference Association Pty Ltd* [1994] 2 Qd R 521; *Teviot Downs Estate Pty Ltd v MTAA Superannuation Fund* [2004] QCA 57.

17 *Moffat Property Development Group Pty Ltd v Hebron Park Pty Ltd* [2008] QSC 177; affirmed on appeal [2009] QCA 60)

18 *Baulkham Hills Private Hospital Pty Ltd v GR Securities Pty Ltd* (1986) 40 NSWLR 631, 634

The clear implication from his Honour's analysis is that emails should be drafted with the same care and precision as formal letters. While the reference to any agreement being subject to contract is essential to a finding that no binding contract exists, it is also clear that the phrase can be ambiguous when considered in the context of the parties' correspondence as a whole. Acceptance of the *fourth category* allows a court with appropriate surrounding context to conclude that an agreement subject to contract is binding despite all terms not being agreed. Greater clarity can be achieved if contracting parties clearly state in correspondence that any agreement on terms is 'not binding' on the parties until a formal contract is executed, rather than the short hand of 'subject to contract'.[19]

Statute of Frauds

A binding agreement for the sale of land is not enforceable unless the agreement or some memorandum of the agreement is in writing and signed by the party to be charged.[20]

Memorandum in writing

A memorandum may be constituted by one or more documents that are read together to form a memorandum. According to the principles of joinder, a document that specifically refers to another document may be read with that document to form a memorandum. The emails between the parties clearly referred to previous email correspondence. Martin J readily concluded there was a memorandum containing all of the essential terms (at [53]). No issue or analysis appears in the judgement about whether the emails were in writing for the purposes of the statute. Clearly emails are in writing as that term is defined in the *Acts Interpretation Act 1954* (Qld),[21] which is usually accepted without argument in most of the authorities.[22]

Signing electronic memorandums

A memorandum is enforceable if signed by the party to be charged or their authorised agent. It was conceded that the representative of the seller had authority to send the email and bind the seller. Instead the seller argued that the email was not properly signed because the requirements of the *Electronic Transactions (Queensland) Act 2001* (ETQA) were not satisfied.

Section 14 ETQA provides for when the legal requirement for a signature may be met for an electronic communication. Resort to this section presupposes that the signature on the electronic communication is not otherwise recognised by the law as a signature. A typed name is recognised by the law as a signature if by typing their name the person is acknowledging the writing as an authenticated expression of the contract. This is referred to as the authenticated signature fiction and was apply by the NSW Supreme Court in *McGuren v Simpson* [2004] NSWSC 35 to a typed name

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19 See also *Vantage Systems Pty Ltd v Priolo Corporation Pty Ltd* [2015] WASC 21 where an agreement for lease was formed by email.

20 *Property Law Act 1974* (Qld), s 59. Equivalent provisions exist in each State and Territory.

21 Writing is defined as 'any mode of representing or reproducing words in a visible form'. Words on a computer screen meet this definition.

22 *Supangat v Byrnes* [2010] QCA 176; *Coles Supermarkets Australia Pty Ltd v FKP Ltd* [2008] FCA 1915

on an email.[23] Although not discussed in *Stellard,* presumably the name of the party sending the email was typed at the end of the email. In this particular case, the acceptance email was sent by an representative of the seller authorised to enter the contract on their behalf. It is unclear why the authenticated signature fiction was not referred to or utilised by the buyer or examined by the court.

The seller argued by reference to the requirements of s 14 ETQA that:

(i) the email did not identify who the author was representing and therefore the method of signing did not sufficiently identify the seller as required by s 14(1)(a); and

(ii) the buyer did not consent to the requirement for a signature being may by the method in the email.

Section 14 applies to requirements under State law where a person's signature is required. The requirement is taken to be met if:

> *(a) a method is used to identify the person and to indicate the person's intention in relation to the information communicated; and*
>
> *(b) the method used was either—*
>
> > *(i) as reliable as appropriate for the purposes for which the electronic communication was generated or communicated, having regard to all the circumstances, including any relevant agreement; or*
> >
> > *(ii) proven in fact to have fulfilled the functions described in paragraph (a), by itself or together with further evidence; and*
>
> *(c) the person to whom the signature is required to be given consents to the requirement being met by using the method mentioned in paragraph (a).*

The central requirement of s 14 is that a 'method' is used to 'identify' a person and indicate their intention in relation to the information communicated. This method must be as reliable as appropriate having regard to the purpose of the communication, to identify the person and indicate their intention. Reliability is proven in the alternative if the method does in fact identify the person and indicate their intention either alone or with further evidence. In the writer's view whether a 'method' is reliable to prove identity and intention or does in fact fulfil these functions must be examined in light of the purpose of the signature requirement in the relevant State law.

In the context of the *Statute of Frauds*, the method of signing should identify the person who is entering the contract and indicate their intention to be bound by the contents of the document. This suggests that a typed name at the end of the email may satisfy this requirement.[24] However, given the purpose of the *Statue of Frauds* in minimising fraud, it is important that the typing of a name

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23 Cf *Stuart v Hishon* [2013] NSWSC 766 where the court was willing to accept a typed name in an email as a signature without resort to the authenticated signature fiction.

24 S Christensen, W Duncan and R Low, 'The Statute of Frauds in the Digital Age – Maintaining the Integrity of Signatures' (2003) 10(4) *E Law – Murdoch University Electronic Journal of Law*.

demonstrates an intention to be bound to a contract on the terms set out in the email. In the writer's view this can only be achieved, in the same way as the authenticated signature fiction, by reference to extrinsic evidence. To date courts have accepted with little debate or analysis that a typed name will satisfy this requirement without further evidence. In *Faulks v Cameron*[25] the court considered the effectiveness of an electronic signature under the provisions of the *Electronic Transactions (Northern Territory) Act 2000* (NT). Consideration was given to emails that ended with the typewritten words 'Regards Angus' and 'Regards Angus Cameron'. With surprisingly little analysis, it was held that the emails had been signed. Young AM was satisfied that:

> [T]he printed signature on the defendant's emails identifies him and indicates his approval of the information communicated, that the method was reliable as was appropriate and that the plaintiff consented to the method. I am satisfied that the agreement is 'signed'.[26]

Stellard is the first reported decision where a court has considered the operation of the signature provisions of the *Electronic Transactions Act* in the context of a land contract. The seller argued that the acceptance email did not identify the seller as the acceptor of the offer. Martin J concluded that this was not fatal because extrinsic evidence could be used in accordance with s 14(1)(b)(ii). The various conversations prior to the offer and the offer email together with an admission from the sender of the acceptance email provided evidence of identity and intention. The decision does not identify the actual signature 'method' being considered and appears to accept that it is sufficient for the extrinsic evidence of itself to prove identity and intention. On the basis of this approach identity and intention may be proven by extrinsic evidence even where the email is unsigned, but the person is identified by an email address.[27] In the writer's respectful view, s 14(1) requires first that a signature method is identified and secondly, that the method must prove identity and intention. An email with no typed name does not appear to fulfil the requirement for a method of signing. The purpose of introducing extrinsic evidence is to support the reliability of the signature method not to provide an alternative method of fulfilling a signature requirement.

The final requirement of s 14 is consent by the recipient of the electronic communication to the signature requirement being met by the use of the relevant signature method. Absent the existence of express consent, there is little discussion in the case law about when conduct will be construed as the giving of consent.[28] Consent under s 14 must be given to 'the method' used to satisfy the signature requirement which is a narrower requirement than consent under s 11 to the giving of information by an electronic communication.[29] In *Stellard*, Martin J concluded that consent to the 'method' was evidenced by the negotiation by email and an offer being made by email (at [68]). There is no identification of the method referred to and it appears that consent is being implied to the use of email. In the writer's respectful view the consent is required to the signature method and not the method of communication.

Conclusion

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25 (2004) 32 Fam LR 417.

26 Ibid 426.

27 In *J Pereira Fernandes SA v Mehta* [2006] 2 All ER 891 it was held that an email address in the header is not a signature.

28 A De Zilva, 'Electronic Transactions Legislation: An Australian Perspective' (2003) 37 *The International Lawyer* 100.

29 S Christensen, W Duncan and R Low, 'Moving Queensland Property Transactions to the Digital Age: Can Writing and Signature Requirements Be Fulfilled Electronically?' (2002) Queensland University of Technology <www.law.qut.edu.au/files/digital.pdf>.

Electronic communications are now commonplace in commercial and business transactions. *Stellard* continues the judicial trend of accepting emails as capable of forming the basis of an enforceable contract for both commercial and property transactions. The decision highlights the importance of commercial parties and their lawyers carefully drafting emails, particularly in the negotiation phase of a transaction. The willingness of courts to accept typed names on emails as signatures for contractual purposes increases the importance of being clear about when finality in negotiations has been reached and a binding contract created.